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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1255

JAMES E. DOUGLAS, JR.,

Appellant,

v.

SEACOAST PRODUCTS, INC., ET AL.,

Appellees.

BRIEF OF THE STATE OF MARYLAND AMICUS CURIAE IN SUPPORT OF STATEMENT AS TO JURISDICTION

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BRIEF OF THE STATE OF MARYLAND AMICUS CURIAE IN SUPPORT OF STATEMENT AS TO JURISDICTION

INTERESTS OF AMICUS CURIAE

Maryland and Virginia share probably the most unique estuary in the world, the Chesapeake Bay. This body of water is the producer of vast amounts of seafood which exist in the form of shellfish and various finfish species. The amount that is harvested impacts upon a great number of supportive services and industries, which in turn affects the well being of the citizens of both States. Food fish production in the Bay depends upon the availability of certain fish species which spend part of their time in the territorial seas offshore Maryland and Virginia. For instance, menhaden, the subject of this litigation, are locally known

as alewives, bunkers, pogies and big eyes, and are the basic staple forage fish in the waters of the Chesapeake Bay and the nearby waters of the Atlantic Ocean. It is a basic biological principle that certain support and food fish species, such as striped bass, blue fish, and weakfish (sea trout), depend upon menhaden for their basic nutritional requirements.

The upper Chesapeake Bay and the inshore bays of the Atlantic Ocean constitute the largest single menhaden nursery area on the Atlantic coast. Therefore, the overharvesting of the menhaden would result in a direct reduction of marketable finfish within the Chesapeake Bay.

Although the value of fish as a food has risen in most drastic terms recently, a review of the pounds harvested indicates the serious need for strong conservation and management techniques. For instance, in 1955, 18,352,000 pounds of finfish were landed in Maryland. Landings reached an all-time high in 1965 with more than 35 million pounds landed, but since that time, because of increased market pressures and other factors, landings have dwindled to a low point of 14,915,000 pounds in 1975.

Historically, Maryland has attempted to limit its commercial fisheries to residents of the State.[1] The pressures upon the commercial fishery industry have been heightened in recent years. The Bay is the involuntary recipient of streams of urban runoff, by-products of development, and also receives its pollution

[1] For instance, §4-703 of Natural Resources Article, Annotated Code of Md. (1974 Vol. and 1975 Supp.), which prohibits nonresidents from catching finfish by net, was originally enacted by Chapter 67, Maryland Laws of 1842; §4-1003 of the Natural Resources Article, which limits commercial taking of oysters and clams to Maryland residents,

load from sewage treatment plants and industrial effluents. Great strides have been made to reduce these forces, but the availability of fish for use as a protein foodstuff has also resulted in increased and more efficient methods of harvesting. Maryland recognizes the absolute necessity to preserve and manage the fisheries in order to maintain the Bay as a highly productive estuary. Maryland files this brief, therefore, in strong support of the jurisdictional statement of Virginia.

OPINION BELOW

The opinion below was entered by a three-judge court for the Eastern District of Virginia on 7 November 1975. Copies of the opinion and final order are attached hereto as Appendix A.

JURISDICTION

The opinion of the three-judge District Court was entered on November 7, 1975. Appellant filed notice of appeal on January 5, 1976 in U.S. District Court for the Eastern District of Virginia. The jurisdiction of the Supreme Court to review this decision by appeal is pursuant to 28 USC §1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of the United States Constitution involved in this controversy are the Supremacy Clause,

originated through Chapter 292, Maryland Laws of 1854; §4-704 of the Natural Resources Article, which requires that an applicant for a commercial net fishing license be either a lawful resident of the State or a landowner, was first enacted through Chapter 441, Maryland Laws of 1896; §4-805 of the Natural Resources Article, which prohibits nonresidents from catching crabs for commercial purposes, had its beginning through Chapter 544, Maryland Laws of 1916.

Article VI, ¶2 and the Equal Protection Clause, Amendment XIV, §2. The statutory provisions are 16 U.S.C. §1081, 43 U.S.C. §1301 et seq. and Virginia Code §§28.1-60 and 28.1-81.1. These statutes and provisions are set out in full in Appendix B.

QUESTIONS PRESENTED

1. May a state, in order to conserve and maintain a viable commercial fishery, limit commercial harvesting on a residential or non-alien basis?

2. Does 16 U.S.C. §1081 preempt the Virginia Statutes enacted under the police power to manage and protect a fishery resource, part of which is wholly within the inland waters of the state?

STATEMENT

The state of Maryland adopts the statement of the case contained within the brief of Appellant.

THE QUESTIONS ARE SUBSTANTIAL

The substantiality of a constitutional claim is no longer questioned merely because it is joined with a preemption challenge, as in the instant case. *Florida Lime & Avacado Growers v. Jacobsen*, 362 U.S. 73 (1960); *see also Kesler v. Department of Public Safety*, 369 U.S. 152 (1962).

At stake in this case is the ability of a state to manage and conserve resources totally within its boundaries by a particular method. That method may entail restrictions of nonresidents from commercial fishing both within the inland waters of the state and also in the territorial sea.[2] It is generally recognized

[2] The term "territorial sea" is used herein to define the 3-mile zone offshore the Atlantic coast. This area is also known as the "marine belt", "marginal sea" and "3 mile limit". The landward limit of this zone is coterminous with the seaward limits of inland waters. Shalowitz, *Shore and Sea Boundaries* Vol. 1, p. 23.

that a proper and necessary function of the police power is to provide protection to the fishery resources in the state. *See Maryland Dept. of Natural Resources v. Amerada Hess Corp.*, 350 F. Supp. 1066 (D. Md. 1972); *Corsa v. Tawes*, 149 F. Supp. 771 (D. Md. 1957), Aff'd. 355 U.S. 37 (1957) (*per curiam*); *Potomac Sand & Gravel Co. v. Governor of Maryland*, 266 Md. 358 (1972).

A vital element of a state's action to restrict commercial fishery in the territorial seas is the relation of that restriction to the enhancement and management of the fishery within the state's inland waters. This is the case here for what is harvested in the territorial sea directly effects what is spawned, nurtured, and matures within the waters of the Chesapeake Bay.

The Court below did not attempt to distinguish the role of a coastal state in protecting its fishery resources in inland waters as distinguished from the territorial sea. *McCready v. Virginia*, 144 U.S. 391 (1877), has survived because that distinction has been sustained by this Court.

I.

WHETHER THE COMMONWEALTH OF VIRGINIA CAN PROTECT ITS FISHERY RESOURCES FROM THE PRESSURES OF OVERHARVESTING BY USING DIFFERENT COMMERCIAL FISHERY CLASSIFICATIONS FOR RESIDENTS, NONRESIDENTS AND ALIENS.

Basic self-interest leads an individual to take as much as possible from a resource before another individual arrives at that same resource. *See* G. Harden, "The Tragedy of Commons", *Science Magazine*, Dec. 13, 1968, at 1243-48. Gradually this activity results in the

loss of a resource. To counter against this, the regulator or proprietor of the resource should be permitted to classify the exploiter on the basis of his interest in conserving and maintaining a given resource. It is unquestioned that a local fisherman, possessing local, geographical community responsibilities has a greater interest in maintaining a stable and consistent resource. This fact is implicit in H.R. 200, 94th Cong., 1st Sess. (1976), reported out of the Joint Senate/House Conference on March 17, which would authorize the imposition of a 200 mile jurisdictional limit for United States fisheries in 1977.

Query: if the Federal government can legitimately seek to exclude alien vessels from the 200 mile zone as a means to manage the fishery resource, why is not the same procedure available to the states?

Recently the United States District Court for Maine was presented with a similar question. At issue was the constitutionality of a Maine statute which would prohibit the issuance of a lobster or crab commercial fishing license to one who had not been a resident of Maine for at least three years, and who had not remained in the physically in the state of Maine for at least eight months of each year. The Court struck down the three year durational requirement upon the basis that that type of invidious distinction had no rational basis and was not related to the protection of the resource. The Court simply stated that there was no rational basis for distinguishing between old and new residents. *Massey v. Apollonio,* 387 F. Supp. 373 (D. Me. 1974). The Court refused, however, to hold that the residence requirements should also fall. *Id.* at 377.

The basic test in determining whether a law is violative of equal protection, is whether or not the

chosen classification is without any reasonable basis to the end it seeks to serve. *See McGowan v. Maryland,* 366 U.S. 420, 81 S. Ct. 1101 (1961). Identification of the "reasonable basis" has also been the focal point of the "due process" decision recently issued by this Court in *North Dakota Board of Pharmacy v. Snyder's Drug Stores,* 414 U.S. 156 (1973). This case specifically overruled *Liggett Co. v. Baldridge,* 278 U.S. 105 (1928) and upheld a North Dakota statute which required that a majority of stock of a corporate applicant have a permit to operate a pharmacy must be owned by a registered pharmacist responsible for the management and operations of the pharmacy. In overruling *Liggett,* this Honorable Court declared:

> "The majority of the Court in *Liggett* for which Mr. Justice Sutherland spoke held that business or property rights could be regulated under the Fourteenth Amendment only if the 'legislation bears a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare,' 278 U.S. at 111-112, 73 L. Ed. 204 . . . . The opposed view stated by Mr. Justice Holmes, and concurred in by Mr. Justice Brandeis, was:
>
> > '. . . The Constitution does not make it a condition of preventive legislation that it should work a perfect cure. It is enough if the questioned act has a manifest tendency to cure or at least to make the evil less.' *Id.*, 114-115, 73 L. Ed. 204.
>
> "Those two opposed views of public policy are considerations for the legislative choice. The *Liggett* case was a creation at war with the earlier constitutional view of legislative power, *Munn v. Illinois,* 94 U.S. 113, 132, 134, 24 L. Ed. 77, and opposed to our more recent decisions. *Olsen v. Nebraska,* 313 U.S. 236, 241, 85 L. Ed. 1305, 61 S. Ct. 862, 133 A.L.R. 1500; *Williamson v. Lee Optical*

> *Co.*, 348 U.S. 483, 487-488, 99 L. Ed. 563, 75 S. Ct. 461; *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 96 L. Ed. 469, 72 S. Ct. 405, as well as the *Daniel, Lincoln Union*, and *Ferguson* cases already discussed. The *Liggett* case, being a derelict in the stream of the law, is hereby overruled. We reverse and remand the judgment below and free the courts and agencies of North Dakota from what the State Supreme Court deemed to be the mandate of *Liggett." North Dakota, supra* at 166-67.

The Court should honor the presumption that the State legislature has passed a constitutional statute in proscribing certain activities. The Honorable Chief Justice observed in a recent obscenity case, *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1974), as follows:

> ". . . It is not for us to resolve empirical uncertainties underlying state legislation, save in the exceptional cases where that legislation plainly impinges upon rights protected by the Constitution." 413 U.S. at 60.

Illustrating this principle, the Chief Justice stated:

> ". . . when legislatures and administrators act to protect the physical environment from pollution and to preserve our resources of forests, streams, and parks, they must act on such imponderables as the impact of a new highway near or through an existing park or wilderness area." See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 417-420, 91 S. Ct. 814, 824-826 (1971). *Id.* at 62.

Toomer v. Witsell, 334 U.S. 385 (1948) departed from *McCready v. Virginia, supra*, but did not overrule it. The Court held that the privilege of nonresidents in the State of South Carolina to engage in the business of commercial shrimping in the three-mile belt offshore South Carolina was a privilege and immunity of citizenship protected by Article IV, §2 of the United

States Constitution which required "substantially equal" treatment of nonresident commercial fishermen as that accorded resident commercial fishermen. This case was decided shortly after this Court's decision in *U.S. v. California*, 332 U.S. 19 (1947), which held that California did not own the waters offshore its coast nor have a proprietorship interest in the natural resource located therein. This lack of a proprietorship interest was recognized in *Toomer:*

> The fact that it is activity in the three-mile belt which the South Carolina statute regulates is of equal relevance in considering the applicability of the ownership doctrine. While *United States v. California*, 332 U.S. 19 (1947), as indicated above, does not preclude all State regulation of activity in the marginal sea, the case does hold that neither the thirteen original colonies nor their successor States separately acquired "ownership" of the three-mile belt. *Id.* at 402.

The Court then distinguished *McCready* on two counts:) that the *McCready* opinion dealt with sedentary shellfish as compared to the free-swimming shrimp which migrate through the waters of several states; and 2) *McCready* dealt with the regulation of fishing in inland waters as compared to shrimping in the territorial sea.

Arguably *Toomer* would have been decided differently if it surfaced subsequent to the enactment of the Submerged Lands Act in 1953, 43 U.S.C.A. §1301 *et seq.* This Act conferred, confirmed and established the management and use of the submerged lands and natural resources into the respective coastal states and, therefore, serves as a jurisdictional basis for the assertion of State prerogative with the three-mile belt. *See also State v. Norton*, 335 A.2d 607 (S. Ct. Me. 1975).

II.

WHETHER 16 U.S.C. §1081 PREEMPTED STATE REGULATION OF FISHERIES IN THE TERRITORIAL SEAS.

16 U.S.C. §1081 prohibits all non-United States vessels from engaging in fisheries within the territorial waters of the United States. This section further provides a method for the Secretary of the Treasury to issue exemptions to the broad proscription upon certain conditions. The language is negative in nature, the only affirmative act assumed by the Federal government is to grant the exceptions to the prohibition.[3] The intent expressed for the Federal government to authorize which in fact would authorize non-United States vessels into this three-mile wide belt.

Clearly passage of the Submerged Lands Act of 1953, 43 U.S.C. §1301 *et seq.*, was an affirmative indication that the states were to assume and perpetuate management prerogatives in this zone. 16 U.S.C. §1081 does not really address the scope of the Submerged Lands Act and clearly there is no expression of legislative intent to impliedly repeal or amend the Act.

If a coastal state does not encroach upon the Federal sphere of influence, i.e. the authorization of exemptions to alien vessels, the state action should be sustained. *See Askew v. American Waterway Operators*, 411 U.S. 325 (1973); *see also Cooley v. Board of Wardens of the Port of Philadelphia*, 53 U.S. 299 (1851).

[3] This act further provides, within §1091, the assumption by the Federal government of certain responsibilities within the contiguous zone extending from 3 miles to 12 miles into the ocean. *See U.S. v. F/V Taiyo Maru No. 28 S01-600*, 395 F. Supp. 413 (D. Me. 1975).

CONCLUSION

The issues presented to this Court clearly transcend their application to the parties involved. If the District Court opinion stands, it would invalidate the natural resources management laws of many States, affecting not only fisheries, but wildlife management regulations as well. This Court should define the distance a state may traverse in order to protect its natural resources. For instance, in order to accomplish this task, can a state place nonresidents in a category different from residents? Should a state classify waters wholly within its boundaries differently from those within the three-mile territorial sea?

We respectfully request that this Court note probable jurisdiction in this case.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

CIVIL ACTION No. 75-69-NN

(Three-Judge Court)

SEACOAST PRODUCTS, INC., THE NEW SMITH MEAL COMPANY, INC. AND SECOND OCEANIC CORPORATION,
Plaintiffs,

v.

JAMES E. DOUGLAS, JR., COMMISSIONER, VIRGINIA MARINE RESOURCES COMMISSION,
Defendant.

FINAL ORDER

Upon consideration of the record, including the affidavits filed herein and the stipulations of counsel, as well as of the arguments of counsel orally and on brief, the Court, for the reasons stated in its opinion this day filed, ADJUDGES, ORDERS and DECREES:

1. That the motion of the plaintiffs for summary judgment in accordance with the complaint, be and it is hereby, sustained;

2. That the defendant, his successor and successors in office, as well as his agents, servants, employees and attorneys be and each of them is hereby restrained and enjoined from the enforcement against the plaintiffs or any

of them of the statutes designated as Code of Virginia, §§ 28.1-60 and 28.1-81.1, in respect to the prohibitions of the plaintiffs to engage in fishing for menhaden in Chesapeake Bay and in the Atlantic Ocean within three miles of the shore of Virginia; and

3. That the plaintiff recover their costs of the defendant.

/s/ Albert V. Bryan
Senior United States Circuit Judge

/s/ Richard B. Kellam
United States District Judge

/s/ John A. MacKenzie
United States District Judge

November 7, 1975.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

CIVIL ACTION No. 75-69-NN

SEACOAST PRODUCTS, INC., THE NEW SMITH MEAL COMPANY, INC. AND SECOND OCEANIC CORPORATION,
Plaintiffs,

v.

JAMES E. DOUGLAS, JR., COMMISSIONER, VIRGINIA MARINE RESOURCES COMMISSION,
Defendant.

THREE-JUDGE COURT

Argued: October 15, 1975 Decided: November 7, 1975

Before BRYAN, Senior Circuit Judge, KELLAM, District Judge and MacKENZIE, District Judge.

T. H. Willcox, Jr., of Willcox, Savage, Lawrence, Dickson & Spindle, Norfolk, Virginia, counsel for plaintiffs; James E. Moore, Assistant Attorney General [Andrew P. Miller, Attorney General], Richmond, Virginia, counsel for defendant.

Albert V. Bryan, Senior Circuit Judge:

In question here is the constitutionality of two Virginia statutes restricting the fishing of menhaden in her part of Chesapeake Bay and in the Atlantic Ocean within three

miles[1] of her coast. Plaintiffs, Seacoast Products, Inc., The New Smith Meal Company, Inc., and Second Oceanic Corporation, now and for a number of years engaged in such fishing in these areas, sue the Virginia Commissioner of Marine Resources to have these restrictions declared invalid and to enjoin his imposed enforcement of them.[2] Plaintiffs' motion for summary judgment must be sustained.[3]

The two statutes are Virginia Code § 28.1-60 and § 28.1-81.1. Epitomized, the force of § 28.1-60 is to allow a non-resident a license to fish menhaden "within the three-mile limit" but to exclude *non-residents* of Virginia from menhaden fishing in the Virginia portion of Chesapeake Bay, while at the same time permitting Virginia *residents* to fish for menhaden in that body of water. The force of § 28.1-81.1 is to exclude any fishing by *aliens* within the three-mile limit off the Virginia coast. Thus non-residence and alienage are the determinant factors in the ban of plaintiffs from a piscary for menhaden.

The challenged provisions, we conclude, "flagrantly and patently" as well as irreparably offend plaintiffs' rights under the Fourteenth Amendment's equal protection clause and under the preemptive and exclusive Federal regulation of sea fisheries. In this context the doctrines of abstention

[1] This is known as the 3-mile limit or the jurisdictional belt along the coasts of the ocean bordering States. It was fixed by Secretary of State Thomas Jefferson in 1793 and has been generally accepted internationally. United States v. California, 332 U.S. 19, 33 (1947).

[2] Jurisdiction is rested on complete diversity of citizenship between plaintiffs and defendant as well as on the presence of a Federal question. 28 U.S.C. 1331, 1332. That the amount involved is in excess of $10,000, exclusive of interest and costs, is not disputed. A three-judge court has been convened in accordance with 28 U.S.C. 2281 and 2284.

[3] There are no critical, genuine factual differences between the parties.

have no place. In other circumstances they are appropriate: to obtain interpretation of a State statute, Railroad Commission v. Pullman Co., 312 U.S. 496 (1941); or to avoid needless interference with the administration of State domestic policies, Alabama Public Service Commission v. Southern Railway Co., 341 U.S. 341 (1951); or to avoid obstruction of State prosecutions, Younger v. Harris, 401 U.S. 37 (1971); but forbearance of Federal judicial action is not demanded when the deprivation of rights is so severe, clear and damaging as here. Huffman v. Pursue, 420 U.S. 592, 602 (1975); *Younger, supra*, at 53-54; Zwickler v. Koota, 389 U.S. 241, 248, 249-250 (1967). For the same reasons prior exhaustion of State administrative or judicial remedies is not mandatory. On study of the merits of the complaint we grant the relief it prays.

Plaintiff Seacoast Products is a Delaware chartered corporation with its principal office in New Jersey; Smith Meal is a Massachusetts corporation with its office in New Jersey; and Oceanic is a New York corporation having its principal place of business in that State. The last two corporations are wholly-owned subsidiaries of Seacoast which in turn is ultimately controlled, through subsidiaries, by Hanson Trust Ltd., a corporation organized and existing under the laws of the United Kingdom. For many years the plaintiff parent and subsidiary corporations have been embarked on menhaden seining in Chesapeake Bay and in the Virginia three-mile ocean belt.

Menhaden are not edible by humans. They are ground into fish meal for poultry feed, fish solubles as ingredients of animal feed, and fish oil for the manufacture in Europe and Canada of margarine. Hence the statutes are not purposed to conserve the food supply of the State. It is conceded by plaintiffs that Virginia could exact from them the same

licenses as she required of residents for fisheries in her inland waters. Indeed, plaintiffs have heretofore applied for and been granted the requisite licenses for several years past. However, based on the two Code sections, their applications were denied in May 1975 because of their non-resident status and ultimate British control.

I. Plaintiffs' first point is that since the licenses are granted to Virginia domestic and resident corporations but refused non-resident corporations, there is discrimination in contravention of the Fourteenth Amendment assurance of equal protection of the laws. It cannot be successfully gainsaid that this is in actuality the impact of § 28.1-60.

Particularly exampling the discrimination is the licensing of Zapata Haynie Corporation and Standard Products Company, Inc., both resident corporations of Virginia, to fish menhaden in the areas forbidden non-residents. It is alleged, without contradiction, that Zapata is the largest, Seacoast the next largest and Standard the third largest of such fishers.

Supportive of plaintiffs is Takahashi v. Fish and Game Commission, 334 U.S. 410, 419-20 (1948). It dealt with the denial by a State of a license to a lawfully resident Japanese to earn his living by fishing commercially in ocean waters off her coast. The State action was premised on his ineligibility under Federal law to achieve United States citizenship. In reaching its decision the Court declared the equality in *every* State of all who are lawful residents of *any* State:

> "The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under non-discriminatory laws."

Incidentally, the Court in both *Takahashi*, supra, at p. 420, and in Toomer v. Witsell, 334 U.S. 385, 401 (1948) declined to treat, as *contra*, McCready v. Virginia, 94 U.S. 391 (1876) upholding the State statute prohibiting "citizens of other States but not Virginia citizens from planting oysters" in her tidal river waters.

II. The alienage issue, made by the plaintiffs' attack on Virginia Code, § 28.1-81.1, is predicated on the statute's denial of a commercial license to any person, firm or corporation not a citizen of the United States for the taking of any fish from the marginal ocean waters of Virginia. The vitality of that statute, however, has been superseded by an Act of Congress approved May 20, 1964, 78 Stat. 194, 16 U.S.C. 1081, et seq., declaring as far as pertinent here that "[i]t is unlawful for any vessel, except a vessel of the United States, or for any master or other person in charge of such a vessel, to engage in the fisheries within the territorial waters of the United States . . .", except upon authorizations not relevant here. In our judgment this legislation preempted Virginia's control of commercial sea fisheries and superseded the State's regulation of them. Toomer v. Witsell, 334 U.S. 385, 393, 394 (1948); United States v. California, supra, 332 U.S. 19 (1947); Skiriotes v. Florida, 313 U.S. 69, 75 (1941); Manchester v. Massachusetts, 139 U.S. 240 (1891).

Subsequently, the United States allowed Seacoast's 68 vessels to be documented unconditionally as vessels of the United States, thus rendering them eligible under 16 U.S.C. 1081 to fish within the Virginia 3-mile limit. The acceptance was ordered by the Secretary of Commerce under the provisions of the Shipping Act, 46 U.S.C. 808, 839. He acted only after a full hearing, at which competing fisheries opposed the approval because of the British interest in Seacoast.

Although it is not an issue here, the evidence is abundant to warrant the documentation. Seacoast is, as heretofore noted, incorporated under the laws of Delaware; it is operated by boards of citizen directors and officers; all the ship officers and crews are also United States citizens. Clearly, Seacoast and its subsidiaries are lawfully fishing in the Virginia waters despite her proscriptive statute.

However, the State maintains that the statute is essential to the protection of the State's ocean waters against depredations by citizens of foreign countries or their ships. The argument is that the jurisdiction of the Federal government begins at the farther limit of the 3-mile zone and from there extends to the limit of the new 12-miles sovereignty line of the United States. Virginia concludes that, therefore, she has the duty and power to exercise control within the 3-mile limit. We are unable to agree. The decisions heretofore cited—*Toomer*, *California*, *Skiriotes* and *Manchester*, supra—determining Federal jurisdiction over the marginal sea to be superior to the rights of the States also declare that the Federal government has paramount authority in the entire marginal belt, including the 3-mile limit. Accordingly, prevention of incursions by foreigners is the responsibility exclusively of the Federal government.

III. Finally, enforcement of the Virginia statutes uncontestably would inflict irreparable injury upon plaintiffs because of the natural habits of menhaden. Migratory fin fishes commonly swimming on the surface in great shoals or schools, they are taken in purse-nets. From January to March they congregate in the far offshore seawaters from North Carolina to Florida. Beginning in March they run northwardly, as far as Cape Cod. They return in the fall and in January move again far out to sea—later to retrace their March-October path. Only in the summer are they to

be found just outshore, when and where, obviously, fishing of them is practicable.

Should Virginia press its two statutes—both of which contain severe sanctions for violations—during the summer by the seizure of even one of plaintiffs' ships, since it loads $80,000 worth of menhaden, or by otherwise interrupting plaintiffs' fishing, there would be no recoupment whatsoever for losses occurring during or after the prosecution of the charges, no matter if plaintiffs prevailed at trial. Catches already made would also be lost for the cargoes are quickly perishable. It is reasonable to assume that any such litigation could last for months, certainly into the summer season. These very facts prove the irreparable injury the Court predicted in Toomer v. Witsell, supra, 334 U.S. 385, 392 (1948). "[T]he danger of irreparable loss is both great and immediate." Fenner v. Boykin, 271 U.S. 240, 243 (1926).

Thus plaintiffs' prayer for an injunction, in addition to a declaration of the invalidity of the Virginia statutes, should be granted restraining the continued refusal of the defendant Commissioner to issue the requisite licenses to plaintiffs.

An order will be entered effectuating this opinion.

APPENDIX B

Supremacy Clause, U.S. Const. art. VI, ¶ 2

This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

Equal Protection Clause, U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

16 U.S.C. § 1081

It is unlawful for any vessel, except a vessel of the United States, or for any master or other person in charge of such a vessel, to engage in the fisheries within the territorial waters of the United States, its territories and possessions and the Commonwealth of Puerto Rico, or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters or in such waters to engage in activities in support of a foreign fishery fleet or to engage in the taking of any Continental Shelf fishery resource which appertains to the United States except as provided in this chapter or as expressly provided by an international agreement to which the United States

is a party. However, sixty days after written notice to the President of the Senate and the Speaker of the House of Representatives of intent to do so, the Secretary of the Treasury may authorize a vessel other than a vessel of the United States to engage in fishing for designated species within the territorial waters of the United States or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters or for resources of the Continental Shelf which appertain to the United States upon certification by the Secretaries of State and of Commerce that such permission would be in the national interest and upon concurrence of any State, Commonwealth, territory, or possession directly affected. The authorization in this section may be granted only after a finding by the Secretary of Commerce that the country of registry, documentation, or licensing extends substantially the same fishing privileges for a fishery to vessels of the United States. Notwithstanding any other provision of law, the Secretary of State, with the concurrence of the Secretaries of the Treasury and of Commerce, may permit a vessel, other than a vessel of the United States, owned or operated by an international organization of which the United States is a member, to engage in fishery research within the territorial waters of the United States or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters, or for resources of the Continental Shelf which appertain to the United States and to land its catch in a port of the United States in accordance with such conditions as the Secretary may prescribe whenever they determine such action is in the national interest.

Va. Code § 28.1-60

Non-residents generally.—(1) *Catching fish for oil or guano prohibited.*—No nonresident of this State shall take or catch any fish, in the waters of the Commonwealth, or in the waters under its joint jurisdiction, for the purpose of converting the same into oil, fish scrap, fish meal or guano, except as hereinafter provided; nor shall any nonresident be concerned or interested with any resident as partner or otherwise, except as a stockholder in a domestic corporation, in taking or catching fish in any of the waters of this State to be manufactured into oil, fish scrap, fish meal or guano, or in such manufacture, except as hereinafter provided.

(2) *Resident not to be interested.*—Nor shall any resident of this State be concerned or interested with any nonresident as partner or otherwise, except as stockholder in a domestic corporation, in taking or catching fish in any of the waters of this State to be manufactured into oil, fish scrap, fish meal or guano, or in such manufacture, except as hereinafter provided, or knowingly permit any nonresident to use his name for either purpose.

(3) *License for taking menhaden fish.*—A nonresident person, firm or corporation *may* take or catch the fish known as "menhaden," within the three-mile limit on the seacoast of Virginia and east of a straight line drawn from Cape Charles Lighthouse to Cape Henry Lighthouse for the purpose of converting the same into oil, fish scrap, fish meal or guano between the last Monday of May and the first day of December of each year; provided such person, firm or corporation has applied for and obtained license to take and catch such fish within the above-defined area and in accordance with the following requirements.

(4) *Application for license; affidavit required.*—Such nonresident person, firm or corporation shall apply to the Commissioner of Fisheries for such license, at the office of the Commissioner. Before granting such license the Commissioner shall require the applicant applying for the same to disclose by written affidavit:

(a) The true name or names of the person, persons, firm or corporation owning the purse net, seine, vessel or watercraft, and all the apparatus thereunto belonging, for which the license is desired; and if it be a firm, the true names and addresses of all the members of such firm; and, if a corporation, the location of the principal office and the names and addresses of the officers thereof.

(b) The name of each and every vessel, steamer or other watercraft, and the port in which the same is registered, for which such license is desired.

(c) That during the period of the license the owners and all persons employed by them will not violate any of the laws of this State in regard to the taking and catching of fish in the waters thereof.

Should the Commissioner of Fisheries be fully satisfied that the statements set forth in the affidavit are true and bona fide he shall then grant a license to such applicant, upon the applicant's payment of the same license fee as set forth for residents in § 28.1-59; provided, that in the event a resident of Virginia would be required to pay higher license fees in the applicant's state, then such applicant shall be required to pay the same license fee in this State which a resident of Virginia would be required to pay in the applicant's state. Nothing in this section shall be construed to permit fishing west of the aforementioned straight line from Cape Charles Lighthouse to Cape Henry Lighthouse.

(5) *Service of process.*—Every such licensee shall by written power of attorney appoint the Secretary of the Commonwealth and his successors in office, its agent, upon whom shall be served all lawful process against or notice to, such licensee, and who shall be authorized to enter an appearance in his behalf. The service shall only be made upon the Secretary of the Commonwealth, or, in his absence, upon the person in charge of his office, and shall be made in duplicate. The provisions of § 8-47 shall not apply to process in any action, suit, or motion against such licensee to be served upon the Secretary of the Commonwealth. A copy of such power of attorney, duly certified and authenticated shall be filed with the Secretary of the Commonwealth, and copies thereof duly certified by him shall be received as evidence in all the courts of this State. No judgment shall be entered against the licensee until after the process has been served as set forth for at least ten days.

Whenever lawful process against, or notice to, any such nonresident person, firm or corporation shall be served as hereinabove provided for, the Secretary of the Commonwealth shall forthwith mail a copy of such process or notice to such nonresident person, firm or corporation. For the first process or notice to be so mailed, the Secretary of the Commonwealth shall collect two dollars and fifty cents, and for each additional process or notice to be so mailed the sum of fifty cents, which shall be paid by the plaintiff at the time of such service, and the same shall be recovered by him as a part of the taxable costs, if he prevails in the suit or action.

A judgment, decree or order of the court entered or made against any such nonresident person, firm or corporation shall be as valid and binding on such nonresident person, firm or corporation as if such nonresident person, firm or

corporation had been a resident and served with process or notice therein.

(6) *Penalty for violation.*—Any person, firm or corporation violating any of the provisions of this section shall be guilty of a misdemeanor.

Va. Code § 28.1-81.1

Licenses for taking fish restricted to United States citizens.—(a) No commercial license for the taking of food fish or fish for the manufacture into fish meal, fish oil, fish scrap or other purpose shall be granted to any person not a citizen of the United States, nor to any firm, partnership, or association unless each participant therein shall be a citizen of the United States, nor to any corporation unless the same be a citizen of the United States as hereinafter defined. This requirement shall be in addition to, and not in lieu of, any other requisite to the issuance of a license imposed by this chapter or any other provision of the Code of Virginia as amended from time to time.

(b) Within the meaning of this section, no corporation shall be deemed a citizen of the United States unless seventy-five per centum of the interest therein shall be owned by citizens of the United States and unless its president or other chief executive officer and the chairman of its board of directors are citizens of the United States and unless no more of its directors than a minority of the number necessary to constitute a quorum are noncitizens and the corporation is organized under the laws of the United States or of a state, territory, district, or possession thereof.

(c) Seventy-five per centum of the interest in a corporation shall not be deemed to be owned by citizens of the United States (i) if the title to seventy-five per centum of

its stock is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or (ii) if seventy-five percentum of the voting power in such corporation is not vested in citizens of the United States; or (iii) if, through any contract or understanding, it is so arranged that more than twenty-five per centum of the voting power in such corporation may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or (iv) if by any other means whatsoever control of any interest in the corporation in excess of twenty-five per centum is conferred upon or permitted to be exercised by any person who is not a citizen of the United States.